

REMARKS

Reconsideration of this application and the rejection of the claims is respectfully requested. Applicants have attempted to address every objection and ground for rejection in the Office Action dated January 2, 2008 (Paper No. 20071226) and believe the application is now in condition for allowance. The claims have been amended to more clearly describe the present invention.

Applicants acknowledge with thanks withdrawal of rejections based on 35 U.S.C. §§ 102, 103 and 112. Applicants hereby wish to clarify that FIG. 11 was amended in Amendment B, not FIG. 12 as was previously referenced.

Claims 41-57, 61-63 are pending in this application. Claims 61 and 63 are being canceled. New claim 64 is being added. By this amendment, the pending claims are 41-57, 62 and 64.

Claims 41, 46-47, 52, 54-56 and 62 are being amended to address rejections under 35 U.S.C. § 112 and 35 U.S.C. § 102. Support for these amendments is included in the remarks presented below.

Claims 41-57 and 62 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite and for failing to particularly point out and claim the invention. The Examiner believes that previous amendments introduced new matter. Applicants respectfully submit that the amendments and comments contained herein overcome these rejections.

Phrases in claim 41 relating to support of the underside of the upper member are rejected. The Examiner objects to the language "supports substantially" and variations thereof as not being precisely defined. These phrases have been deleted from the claims.

Further, the Examiner contends that supporting the underside of the upper member constitutes new matter. The amendments to the claim are intended to address these matters. While the language in the description does not correspond word-for-word to all the features of the amended claim, it is believed that the claimed subject matter is supported by the description in combination with the drawings. In particular, the shower tray is described as comprising an inner core 8 sandwiched between an upper member 7 and a lower member 9 that form a shell encasing the inner core 8. These elements are shown in Figure 3 and, as can be seen from their shapes, the inner core 8 separates and completely fills the space within the shell between the upper member 7 and lower member 9 and thereby extends throughout the composite body formed thereby. This is also clear from the description of the method of manufacture with reference to Figures 7 to 10.

With regard to claim 41, specifically, support for the shower tray having a well with a floor is provided on page 8, line 9. Support for the upper and lower members being formed of sheet plastics material is provided by the description on page 9, lines 18 and 27. Support for the lower member being on an underside of the shower tray is provided on page 13, lines 29, 30. Although there is no reference to a "top side" in the description, there is description on page 9, lines 16 to 20 of the upper member forming the upper surface of the

shower tray and, as shown in the drawings, the top-side is clearly equivalent to the upper surface. Support for the inner core extending throughout the cavity to fill the gap between the upper and lower members is provided by the description on page 12, lines 18-19. Support for the inner core providing strength and rigidity to the shower tray is provided by the description on page 4, line 25. Support for the inner core separating the upper member and lower member to provide support for the entire floor of the well is provided by the description of the upper member being on the top side (upper surface) of the shower tray and the lower member being on the underside (lower surface) so as form a shell that provides a cavity for the filler material thereby encasing the core which extends throughout the cavity. As the core extends throughout the shell, it supports the entire floor of the well. This is also clear from the drawings, especially Figure 3. Support for the lower member having a means of releasing air from the gap is provided by the description on page 12, lines 28-29. Based on the foregoing, applicants believe claim 41 meets the requirements of 35 U.S.C. § 112. We also believe claims 62 and 64 comply with the requirements of 35 U.S.C. § 112 for similar reasons.

Regarding claim 47, "Acrylic cap" has been amended to read "acrylic layer". Support for this feature is found on page 9, line 20.

Claims 41-57 and 62 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite and for failing to particularly point out and claim the invention. As

described above, the terms “support substantially” and “supporting substantially” have been deleted from the claims. Applicants believe that these amendments overcome this rejection.

The Examiner objects to the reference to the “acrylic cap” of claim 47. As stated above, the “acrylic cap” has been amended to read the “acrylic layer”. Both the acrylic layer and its thickness are disclosed on page 9, lines 20-21. It is further stated that there is insufficient antecedent basis for “the acrylic cap” in claim 47. The amendments to claims 46 and 47 both refer to the acrylic layer, providing antecedent basis for claim 47.

Claims 41-42, 48 and 62 stand rejected under 35 U.S.C. 102(b) as being anticipated by Altman et al. (US 4,067,071). Applicant respectfully traverses this rejection. Amendments to the claims overcome this rejection. At least two features of Applicants’ claims are not disclosed by Altman.

Altman does teach or suggest an inner core to support the entire floor of the liner. In Altman, the bottom wall of the liner rests on the floor of the original bathtub cavity (see column 2, lines 53,54; column 5 lines 41-43; column 6, lines 24,25 and lines 66-68; and column 9, lines 53,53). It is an essential feature of Altman that the bottom wall of the liner rests on and is supported by the original bathtub so that the weight of the water and of a person in the bathtub is transferred directly from the liner to the original bathtub which would have been designed to withstand such weight. Nowhere does Altman teach or suggest an arrangement in which the entire bottom wall of the liner is spaced from the floor of the original bathtub with the filler material filling the gap there between to support the floor. On

the contrary, the floor support is provided by the original bathtub which is equivalent to the lower member in the shower tray of the present invention.

In addition, claim 41 has been amended to refer to the lower member having a means for releasing air from the gap. The air release means enables the core to fill completely the cavity (gap) between the upper and lower members. As a result, the thickness of the core can be controlled to provide the necessary strength while keeping the weight of the shower tray to the minimum. Without the air release means, air pockets may be formed in the core which would weaken the core and the core would have to be made of increased thickness to compensate for this thereby increasing the weight. This again different to Altman where the strength is derived from the original bathtub and there is no suggestion to provide air release means in the original bathtub.

The Examiner's comment regarding not disclosing what "substantially" means has been rendered moot by Applicants' amendments.

Regarding the rejection of claims 52-56, Applicants responded to the previous Office Action by pointing out that means plus function claims are appropriate claims for the subject apparatus claims. In reply, the Examiner states "the phrases do not positively set forth any further structural limitations than those already discussed above and below." However, 35 U.S.C. § 112, paragraph 6 states:

"An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure,

material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

A properly constructed means plus function claim cannot contain structural limitations, yet functional claiming is a valid method of describing features of an invention. Claim 52 includes a locating means which is not included in any prior claims. In claim 53 the locating means is specified as cooperating formations on the upper and lower members. This is not a functional claim, since it specifies a structural limitation, but it does refer to the means plus function of the claim from which it depends. It also positively sets forth a structural limitation not specifically claimed elsewhere. Claims 54 and 55 refer to a “means for releasing air” and a “means for assisting distribution of said filler”, respectively. They are also clearly means plus function claims.

The claims have been amended to use the transitional phrase “further comprising” to more specifically point out the new features being introduced. Since the phrases to which the Examiner objects are clearly means plus function claims, he is asked to withdraw the rejection or more clearly specify the language upon which the rejection is based.

The Examiner states that Altman teaches in col. 4, ll. 12-23 that the lower member is made of acrylonitrile as is claim 48. The citation provided here refers only to Altman’s liner, which is analogous to the upper member of Applicants’ claims. Applicants

find no reference as to the composition of the lower member (or bathtub) of Altman. Thus the feature of this claim is not anticipated by the reference.

Regarding claims 50-51, Altman fails to disclose sockets on the underside of the lower member for receiving legs. The Examiner has pointed to the drain pipe of FIG. 7, the rear side wall of the bathroom and the vertical skirt that extends to the floor in FIG. 4. None of these is a socket. The bathtub could be at least partially supported by the bathroom wall or the vertical skirt. Perhaps the Examiner was thinking that these would function as legs. Even if this were correct, neither reveals the use of a socket for receiving the legs. Applicant submits that, for at least these reasons, claims 50-51 are not anticipated by the wall, front skirt and drain pipe of Altman.

In rejecting claim 57, FIG. 4, #56 is suggested as being analogous to the interlinked recessed regions of the lower member that allow the filter material to flow freely between the members. However, numeral 56 points to the filler material itself and not a feature of the lower member. There are no interlinked recessed regions in the gap, only the gap itself. Thus there is no showing that the additional features of claim 57 are taught by Altman, and this reference cannot anticipate the claimed invention.

Regarding claims 62 and 63, Applicant submits that these claims are not anticipated by Altman. Altman fails to show, at least, a lower member of plastics material on an underside of the tray. Arguments asserted above with respect to claim 48 are reasserted here. The Examiner further points to the front skirt of the liner that is made as the same

material as the liner. However, the front skirt is not part of the underside of the tray. It is used to face the vertical skirt of the bathtub. There is no teaching or suggestion that either the bathtub or the vertical skirt is made of plastic material.

Claim 43 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Altman in view of Swanson (U.S. Patent No. 4,414,385). It is maintained that Swanson is not analogous art. Applicants further submit that the Examiner has failed to establish a *prima facie* case of obviousness with respect to Altman and respectfully traverses the rejection.

According to the MPEP. § 2141.01(a), prior art relied upon must be analogous art. "In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). In the "Answers to Applicant's (sic) Arguments" it is stated that "Altman ('071) and Swanson ('385) are both directed towards cement-like formulations[.]" Whether the two pieces of prior art are related to each other is irrelevant, only how each reference is related to the present application matters.

According to the Swanson, the invention relates to sulfur modified cements used as a lining material for concrete structures, particularly concrete pipes. The present invention does not relate to sulfur modified concretes or anything as a mining material for concrete structures. Thus it is not the same field of endeavor. Nor is it reasonably related to

the particular problem with which the inventor was concerned. In this case, the inventor is trying to build a better shower tray, in particular, a shower tray that does not have a rough surface on the underside of the tray. Neither of these problems is addressed in either Swanson or Altman.

Even if the references are analogous, no *prima facie* case of obviousness has been established. To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). Second, there must be a reasonable expectation of success. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious. *In re Ratti*, 270 F.2d 810, 123 USPQ 349 (CCPA 1959). Finally, to establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). "All words in a claim

must be considered in judging the patentability of that claim against the prior art.” *In re Wilson*, 424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). If an independent claim is nonobvious under 35 U.S.C. § 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).

No motivation to combine the references has been provided in either of the references. It is asserted that Swanson discloses the use of dicyclopentadiene resin for the purpose of providing a material with superior resistance to chemical attack. However, there is no disclosure in Altman of the use of the bathtub or shower in chemically adverse conditions. Nor does Altman have a concrete structure in need of protection by a sulfur modified cement as lining. Thus, there is no motivation to combine these references.

Even if these references were combined, there is little expectation of success in such a combination. Swanson reveals preparation of a coating that is sprayed on concrete. There is no teaching or suggestion that this composition would be useful as a filler material of various thicknesses. As Altman does not reveal the use of a concrete structure, there is no guidance where the coating of Swanson would be used. The coating of Swanson involves a complicated formulation procedure performed at high temperatures and relatively long (30 hour) curing times which are incompatible with the present application. It is also unlikely that the composition of Swanson would be catalyzed using the catalyst proposed by Altman. Thus, there is little expectation of success in combining Altman with Swanson to produce the instant claims.

Finally, the arguments asserted above traversing Altman are reasserted here. Thus, at least two elements of claim 43 are absent from the combination of Altman with Swanson. Thus, since there is neither motivation to combine, expectation of success nor a recitation of all claim elements of Applicants' amended claims, no *prima facie* case of obviousness has been established. Applicants respectfully request that the rejection be withdrawn and the subject claim allowed.

Applicants respectfully suggest that in the outstanding Action, the rejections evidence "picking and choosing" features of various references and combining them when there is no suggestion in those references to do so. It is impermissible within the framework of a 35 U.S.C. § 103 rejection to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art. Furthermore, obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention absent some teaching or suggestion supporting the combination. Teachings of references can be combined only if there is some suggestion or incentive to do so. None of these references, whether cited or of record, taken either alone or in combination, disclose or suggest the invention as claimed. The references do not teach, suggest or exemplify the shower tray claimed by Applicants.

Claim 44-47 and 49-51 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Altman. The Examiner contends that since Altman discloses acrylonitrile

butadiene styrene material, it would be obvious to utilize an acrylic capped acrylonitrile butadiene styrene material. Applicants respectfully traverse this rejection.

Regarding claims 46-47, the Examiner has provided no evidence or reasoning as to why, if acrylonitrile butadiene styrene material is known, it would have been obvious to use acrylic capped acrylonitrile butadiene material. There is no teaching or suggestion in Altman or any cited reference that acrylic capped materials are useful. Capping of the acrylonitrile butadiene material will change its properties. No motivation is suggested as to why one skilled in the art would modify Altman as the Examiner suggests. Also, there are additional claim features of claim 41 that are absent, including the means for releasing air and support of the entire floor by the filler material. The ratio of claim 47 is not suggested in the Altman reference. Applicants therefore suggest that no *prima facie* case of obviousness has been attained and that the instant rejection should be withdrawn.

The Examiner points to numerals 20, 32 and 40 in Figs 4 and 7 as support for providing sockets in an underside of the lower member for receiving legs as featured in claims 50 and 51. None of these features is a socket, either as defined in Altman's specification or using the plain meaning of the word. These numerals refer to a rear side wall, a vertical skirt and a drain pipe, respectively. It is contended that these items can clearly receive legs. It is not clear that a rear side wall can receive legs. This wall is supported and is supported by other walls, floors and ceilings of the structure to which it belongs. A

wall is not raised up simply by putting legs on it. The same is true of the vertical skirt and the drain pipe.

Even if any of these features could receive legs, it is not inherently a socket.

Merriam-Webster's Online Dictionary (<http://www.merriam-webster.com/dictionary/socket>)

defines "socket" as "an opening or hollow that forms a holder for something." The rear side wall and vertical skirt are flat vertical surfaces. There is no opening or hollow that is revealed or suggested. Altman's specification does not disclose any opening or hollow that might be construed as a socket.

Applicants submit that in view of the above-identified amendments and remarks, the claims in their present form are patentably distinct over the art of record. Allowance of the rejected claims is respectfully requested. Should the Examiner discover there are remaining issues which may be resolved by a telephone interview, he is invited to contact Applicants' undersigned attorney at the telephone number listed below.

Respectfully submitted,

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